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FEDERAL COMMUNICATIONS COMMISSION  
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WRITER'S INFORMATION

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February 23, 2001

HAND DELIVERY

ORIGINAL

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street S.W., CY-A257  
Washington, D.C. 20554

Re: *Oral Ex Parte*

Policy and Rules Concerning the Interstate, Interexchange Marketplace  
CC Docket No. 96-61

Implementation of Section 254(g) of the Communications Act of 1934, as  
amended 1998 Biennial Regulatory Review -- Review of Customer  
Premises Equipment and Enhanced Services Unbundling Rules In the  
Interexchange, Exchange Access and Local Exchange Markets CC Docket  
No. 98-183

Dear Ms. Salas:

On Friday February 21, 2001, Jordan Goldstein, Legal Advisor to Commissioner Susan Ness, and I engaged in a teleconference regarding this proceeding.

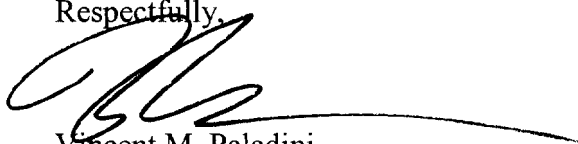
During the teleconference, we discussed the critical role of the Commission's existing rules regarding the bundling of basic telecommunications with customer premises equipment ("CPE") and/or enhanced services. We focused upon the extent to which Internet service providers ("ISPs") must continue to rely upon those rules because

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they lack access to alternative providers of basic telecommunications capability. We also discussed the unwillingness of incumbent carriers to provide ISPs with access to their telecommunications services, especially digital subscriber line (DSL), at reasonable rates and on nondiscriminatory terms. I urged the Commission to clearly articulate its intentions with regard to the application of regulations and legal doctrine that apply to bundling, to minimize the potential for uncertainty in this regard. Finally, I reiterated the recommendation made by a number of participants in this proceeding that the Commission should pay close attention to the fragile nature of competition in the local exchange market and the relevant market power of bundling proponents.

Pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206(b)(1), an original and two copies of this letter and enclosures are being provided to you for inclusion in the public record of the above-referenced proceeding.

Respectfully,



Vincent M. Paladini  
Counsel for  
Commercial Internet eXchange Association

Attachments

/vmp

cc: J. Goldstein , w/ Attachments

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WRITER'S DIRECT NUMBER  
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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

December 14, 1998

VIA HAND DELIVERY

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Room 222  
Washington, D.C. 20554

Re: Ex Parte Presentation  
CC Dkt. No.s 98-147, 95-20, 98-10, 96-61/98-183, 96-98

Dear Ms. Salas:

In accordance with the Commission's *ex parte* rules, this letter is to notify you that the Commercial Internet eXchange Association ("CIX") met on Friday, December 11<sup>th</sup>, with Lawrence Strickling, Carole Matthey, and Jordan Goldstein of the Commission's Common Carrier Bureau. Representatives for CIX at the meeting were Barbara Dooley, Richard Whitt, John Montjoy, Farooq Hussein, Scott Purcell, Ronald Plessner, and me.

During the meeting, CIX presented its positions on the issues presented in the above-referenced dockets, which was consistent with CIX's comments and reply comments in CC Docket No. 98-147, as well as the attached bullet-sheet, the attached December 10 *ex parte* letter, and "Consumers Need ISP Choice" statement. The bullet sheet, the December 10 *ex parte* letter, and the "Consumers Need ISP Choice" statement were provided to each FCC staff person at the meeting. CIX explained its position on ISP choice, and the need for the FCC to take a comprehensive approach to advanced services regulation by revamping the ISP protections (such as in the Computer III FNPRM) at the same time that it establishes a regulatory model for advanced services. CIX opposes the principles of the ILECs' December 7, 1998 *ex parte* letter in CC Dkt. No. 98-147; CIX supports a "true" separate subsidiary approach, as described in its comments, and strongly supports proposed rules to bring more CLEC competition to the

Ms. Magalie Roman Salas  
December 14, 1998  
Page 2

marketplace. CIX also explained that the CLEC certification process is not a long-term solution for most ISPs, due to the expense, the lack of cooperation by ILECs, and the fact that most ISPs have very limited resources. CIX briefly articulated its view on the separate subsidiary model, as explained in the attached bullet sheet and CIX's comments.

In addition, CIX presented its concerns that some ILEC bundling practices, which combine DSL services with ISP service and/or DSL modems, are abusive. In CIX's view, independent ISPs should be offered access to the telecommunications on the same terms and rates as ILEC-affiliated ISPs, and the bundling practices interfere with open competition because the ILEC subsidizes its ISP service through bundled products.

Finally, CIX briefly outlined its support for a reciprocal compensation scheme that does not disrupt existing agreements and state decisions, as CIX has previously articulated in CC Dkt. No. 96-98.

Please find attached 11 copies of this letter for inclusion in each of the above-referenced dockets. Should you have any questions, please contact the undersigned.

Sincerely,



Mark J. O'Connor  
Counsel for the Commercial Internet  
eXchange Association

cc: Lawrence Strickling  
Carol Matthey  
Jordan Goldstein

**I. Regulatory Safeguards to Ensure a Competitive ISP Market Must Be In Place As ILECs Pursue an Integrated Approach to Advanced Services**

- \* Most ILECs may choose an integrated approach, and not a separate subsidiary approach, to deployment of advanced telecommunications and ADSL. However, FCC's framework for ISP regulatory safeguards under the integrated approach – Computer III FNPRM – remains unresolved.
  - Better access to underlying telecom elements will improve ISP choice.
  - Decentralized nature of Internet and quick response to market demand necessitate unbundling.
    - "All or nothing" access to ILEC's is contrary to decentralized nature of Internet.
    - The Internet separates services from physical networks, allowing industries to grow and innovate independently. Unbundling allows independent industry to offer quick response/roll-out of consumer products.
  - Strengthened ONA standards and functional access or collocation for ISPs will prevent anti-competitive and discriminatory behavior and will promote efficient use of network.
  - Computer III reform must move forward together with Section 706 proceeding for strong ISP protections/access to eliminate discrimination and allow ILECs to participate in deregulated markets with the protections of competitive safeguards against ILEC abuses.
  - Because ILECs' rate of future advanced services deployment may be slow, ISP rights to underlying telecommunications would spur advanced services deployment to consumers.

**II. Separate Subsidiary Requirements Must Ensure That the ILEC Affiliate is Divorced From ILEC Monopoly Advantages.**

- \* CIX believes in the emergence of multiple providers of local high-speed telecommunications services. The separate subsidiary approach advances consumer interests only if the ILEC-affiliate is truly another competing provider in the market, with no market advantages due to its affiliation.
- \* *Marketing Advantages:* Use of the ILEC's brand-name or CPNI, as well as joint marketing, should be prohibited. If separate subsidiary resells ILEC voice service, then all CLECs should have the same rights.
- \* *Ownership:* Parent holding company should not be able to finance separate subsidiary on terms that are less than "arm's length." Rather, parent company should be subject to the same credit/financing restrictions as the ILEC vis-à-vis the separate subsidiary. To better ensure "arm's length" transactions and to minimize discriminatory pricing by the separate subsidiary, the separate subsidiary should have minority ownership share (i.e., 10% or 20%) held by third-party.

- \* ***ILEC Transfers to Affiliate:*** Separate subsidiary should have to pay market value for all transfers of facilities or other property from the ILEC. Equipment transferred should be limited to DSLAMs, packet switches.
- \* ***Unbundled Access to Separate Subsidiary's Facilities:*** FCC should establish a transition period so that CLECs can continue to use UNEs of the separate subsidiary. Otherwise, customers may experience dislocation, or competition may be derailed, in transition to new rules.

### **III. ISP Choice is Essential Under Both the Integrated and Separate Subsidiary Approaches**

- \* Consumers must maintain their ability to choose their preferred ISP as ADSL and other technologies are deployed, regardless of whether the ILEC offers services in an integrated manner or through a separate affiliate.
  - Independent ISPs have been a primary factor in the proliferation of the Internet. Today there are over 6,500 ISPs.
  - The vast majority of consumers continue to get their Internet services from independent ISPs, and not the offerings of the ILECs.
- \* The intense competitiveness of the ISP market offers consumers a diverse array of services and service providers, and must be preserved.
  - The diversity of Internet services offered by ISPs provides consumers with a broad range of real service choices.
  - Over 95% of the U.S. population has local access to at least 4 or more ISPs in a market.
- \* Technological advances in the telecommunications underlying Internet access or regulatory changes (e.g., separate data subsidiary) should not be leveraged by ILECs to eliminate consumer choice of Internet services or force ISPs to assert CLEC status to avoid discrimination.
  - ILEC marketing and technology practices threaten ISP choice and competition: bundling CPE, ISP and ADSL services; ISP "partner" programs.
  - "Separate subsidiary" model should provide protection for consumer choice of ISP.
- \* ISP choice means that consumers should be able to choose their ISP on terms equivalent to those of the ILEC affiliated ISP.
- \* ISPs should be able to obtain connectivity from ILECs, or their affiliates, in a non-discriminatory and efficient manner.
  - ILECs should not be permitted to bundle transport services with ADSL offerings.
  - ILEC marketing practices should not discriminate against independent ISPs.



**IV. RBOC InterLATA Entry Into the Internet InterLATA Services Market  
Must Follow the Statutory Scheme of Sections 271 and 272**

- \* Level of demand for Internet bandwidth demonstrates that the Internet works well, there is no showing of network congestion or market "failure" to be resolved through government intervention or LATA modifications.
- \* Carriers demonstrate significant deployment/investment in backbone capacity.
  - Internet industry is experiencing period of unprecedented growth.
  - Number of Internet hosts increased from 1.3 million in 1993 to 36.7 million in 1998.
  - There are over 6,500 ISPs in the U.S. and over 79 million Internet users.
  - One survey estimates that investment to the Internet's network infrastructure increased by 125% between 1996 and 1997.
- \* LATA modifications for RBOCs to enter the interLATA market would conflict with the Section 271 process of incentives for RBOC compliance with local competition obligations.
- \* LATA modifications are inappropriate where RBOC essentially wants to enter the interLATA services market. The Commission's authority to provide LATA "modifications" does not extend to granting premature entry into the interLATA markets.

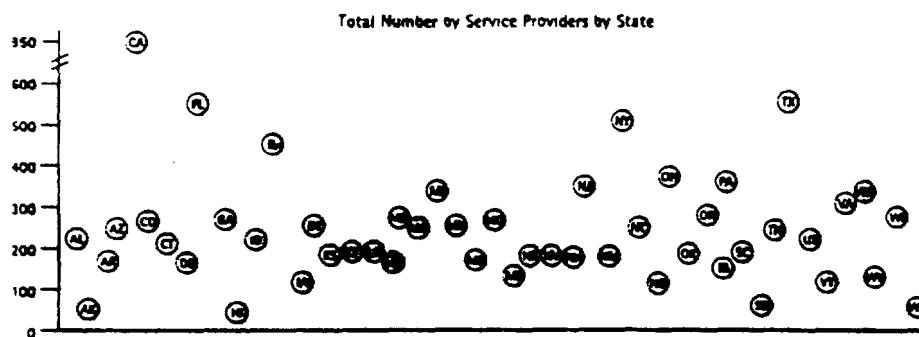
# Consumers Need ISP Choice

**I**nternet Service Providers (ISPs) give individual consumers, small office/home office users, and businesses of all types affordable access to the Internet and its ever-increasing range of services. As the Internet continues its rapid growth, an emerging competitive environment has allowed ISPs to pursue innovative ways to provide faster access, more applications and services, and improved customer service. For Internet growth, innovation, and deployment of advanced services to continue, customer ISP choice is essential. Maintaining and encouraging competition and choice requires that ISPs have efficient and reasonable access to incumbent local exchange carrier (ILEC) facilities, just as the Telecommunications Act of 1996 envisioned. The ILECs must not be permitted to foreclose customer choice by bundling their own branded ISPs with their underlying telecommunications services.

## ISP Choice Fosters Customer Service and Competition

Currently there are over 6,500 independent ISPs. These ISPs have been a primary factor in the proliferation of the Internet. The vast majority of the more than 79 million U.S. Internet users continue to get their Internet services from independent ISPs rather than through services offered by ILECs.

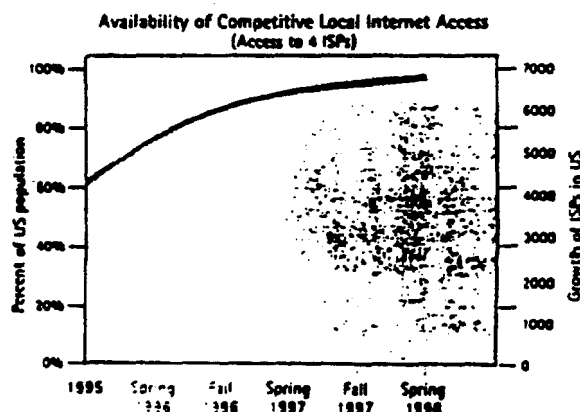
The ISP industry is robustly competitive, providing customers with abundant choices.



Over 96% of the U.S. population has local call access to at least 4 ISPs<sup>1</sup>. Access to several ISPs fosters intense competition in the ISP market, offering customers a diverse array of services and a spur to innovation. For example, Internet transactions are anticipated to rise dramatically, from \$10.4 billion in 1997 to \$204.1 billion in 2001. Consumer choice, including reasonable and efficient access by ISPs to underlying telecommunications networks, will allow the dynamic ISP industry to provide more advanced services for all consumers.

Over 96% of the U.S. population has local access to at least 4 ISPs<sup>1</sup>.

As advanced technologies are deployed for Internet access, customer choice of a preferred ISP is essential to maintain competition, improve customer service, and increase value for ISP users. Similarly, the customer must be afforded an opportunity to select its service provider whether the ISP is independent, a division of an ILEC, or an ILEC affiliate. Choice is essential, whether a customer is an individual consumer, a telecommuter, or a small business. ILEC proposals that will reduce their obligations to afford access to their



The threat to competition:  
ILEC marketing practices  
that aim to leverage the  
ILECs' market power in the  
local loop to advantage  
their own affiliated ISPs.

Policy makers must combat  
this threat to competition by  
enforcing the law: demand  
ILEC compliance with the  
rules requiring unbundling  
of the local loop.

ILECs roll out new products  
such as ADSL only when  
forced to respond to  
marketplace challenges  
such as the deployment of  
cable modems.

The FCC's proceedings on  
Section 706 of the '96 Act  
and Computer III are perfect  
opportunities to reinforce the  
robust competitiveness of the  
ISP market.

facilities will diminish customer choice and competition, and will accrue to the interest of the ILECs.

ILEC marketing and deployment practices already threaten ISP choice and competition. Some ILECs are unfairly "bundling" their ISP service with telecommunications service and/or customer equipment to make it difficult and uneconomic for consumers to have separate ISP choices. To maintain ISP choice, customers should be able to select their preferred ISP, and then have ILEC telecommunications services provided on the same terms the ILEC-affiliated ISPs offers to its customers. ILECs have also announced plans to deploy ADSL service in ways that stifle competition by independent ISPs. ILEC partnering programs, for example, offer ISPs access to underlying ADSL telecommunications at a price that eliminates ISPs' ability to offer a variety of high-speed Internet services at a competitive rate. ILECs also bundle local transport services (ATM and Frame Relay) with ADSL, so that ISPs must buy both services from the ILEC in order to offer customers the benefits of high-bandwidth DSL. This bundled service raises costs for independent ISPs and precludes CLEC competition for transport services.

### The Section 706 and Related Proceedings and Computer III Reforms Must Be Considered Together for More Efficient and Reasonable ISP Access to Advanced Telecommunications

More efficient access to the underlying telecommunications elements that customers and ISPs use to communicate with each other will greatly improve ISP choice. Currently, ILECs offer customers and ISPs "all or nothing" access to their networks: ISPs must buy into the transport service and customers must purchase the ILEC DSL offering. The Internet is a living demonstration that an "all or nothing" access regime is not optimal. The decentralized Internet separates services from physical networks, allowing growth and innovation, independent from owners of the physical network. Unbundling yields innovation based on market demand, and allows independent industry to offer quick response/roll-out of consumer products.

Section 706 of the Telecommunications Act of 1996 requires the FCC to encourage the deployment of advanced telecommunications. ILEC and ISP incentives to deploy Internet services may be different, and the regulatory framework should allow both industries to co-exist for the benefit of consumers. Although ISPs have the ability and incentive to develop a myriad of advanced services to stay ahead of their competition, ILECs do not have the same incentives when seeking to control both the network and the services offered. ILECs are slow to deploy advanced services and deployment of these services is a response to competition rather than action to stay ahead of it. For example, ILECs have deployed ADSL in reaction to cable companies' rollout of high-speed Internet access. Fostering ISPs' innovative ability encompasses allowing non-discriminatory and efficient access to ILEC facilities, thereby permitting ISPs to provide cost-effective, high-speed access and to continue to develop advanced services.

The FCC Section 706 and related initiatives must encompass a comprehensive approach to the issues of advanced services for all Americans. It must have as a fundamental goal to enhance ISP competition and choice. Several precepts will ensure competitive and nondiscriminatory behavior and promote efficient use of ILEC networks. The FCC's Computer III decision advances several important procompetitive policies, including ISP access to network elements and nondiscrimination obligations. Federal action finalizing the Computer III reforms will deter ILEC discrimination against independent ISPs, and allow ISPs to participate in a deregulated market. In addition, strengthened federal ONA requirements and functional access or collocation are effective means to ensure a competitive environment.

This should not mean ISP regulation. The ISP industry today is highly competitive and does not need direct regulation to protect consumers' interests. ILEC control of access to the customer is a separate and distinct regulatory issue. It emanates from a monopoly environment, where networks were financed by ratepayers, not by competitive forces. ISP regulation would force ISPs into becoming CLECs or partnering with CLECs to gain access to the unbundled network elements. Such a requirement would raise barriers to entering the ISP market and eliminate competition from smaller ISPs. Moreover, such a scheme would not serve the goals of providing faster Internet access and more customer choice to places where CLECs do not exist, including rural areas. ISP regulation, rather than allowing easier access to ILEC facilities, does nothing to further customer choice and a competitive environment.

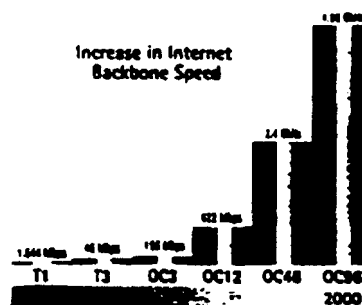
Regulation of ISPs  
is unnecessary and  
unwarranted.

## Internet Backbone Regulation Would Be Counterproductive to Deploying Advanced Services

As the current level of demand for Internet bandwidth from businesses and other customers demonstrates, the Internet responds well. The market has reacted positively to circumstances where additional capacity is needed. In fact, the Internet industry is experiencing a period of unprecedented growth. Bandwidth doubles every four to six months, as compared to three years ago when it doubled every year. Furthermore, Internet backbone providers have demonstrated a significant investment in backbone capacity. One survey estimates that investment to the Internet's network infrastructure increased by 125% between 1996 and 1997. In addition, Internet service providers are continually upgrading their networks to meet network demands and offer innovative services. As this statistical data underscores, regulation of the backbones, as a means to enlarge capacity, would be counterproductive.

The market is operating smoothly and well to respond to increases in demand for bandwidth on the Internet backbones.

Regulation of Internet backbones would add confusion, cost, and inflexibility to Internet arrangements that work well today. Congestion on the Internet is a complex issue to which the industry has responded with solutions without government intervention. There has been tremendous additional capacity and investment in backbone services. The industry is well positioned to provide even more efficient and innovative services arrangements in the future.



## ILEC Relief Under Section 706 and Related Proceedings Is Not Warranted

An ISP's ability to deploy advanced services is limited by access to the ILEC's "last mile"—the connection that ultimately reaches the customer's location, whether that location is a residence or a business. Currently, ILECs control this connection, and the terms and conditions of access offered by the ILECs to competitors, including ISPs, stifles advanced services deployment. ILEC's boast of their control of the last mile.

There is no public policy served, and advanced telecommunications will be deterred, by providing ILECs relief from their obligations to open their local markets through access to their facilities. The competitive safeguards of the 1996 Telecommunications Act are soundly premised on opening local markets to competition, which will yield lower prices and more service choices for customers. These objectives complement the Act's advanced services goal because only with new entrant competition will ILECs invest in and rollout new advanced services to the public. Many of the ILECs' requests for regulatory relief, however, are fundamentally at odds with these objectives and the purpose of the Act. Experience indicates that these obligations have not hampered the ILECs from deploying advanced services, including ADSL, where necessary to meet competition. Further implementation and enforcement of the Act will continue to advance the Act's objectives, and hasten the day of a competitive advanced services market for all Americans.

ILEC relief under Section 706 and related proceedings is unwarranted; their requests for relief are at odds with the goals of the Act.

- **ISP is a competitive industry and ISP choice must be maintained.** Access to the telecommunications networks by the over 6,500 ISPs across the country drives innovation, quality services, and deployment of advanced telecommunications services, and accrues to the benefit of businesses and individual consumers.
- **ILEC practices threaten the competition ISPs provide and the choice they offer.** There is an attempt to use their dominance in the local market and leverage it in the ISP market, which will harm competition.
- **The FCC's Section 706 initiative must encompass a comprehensive approach,** including Computer III reforms, to the deployment of advanced services.
- **ILEC relief from the obligation to open networks is not warranted.**
- **Regulation of Internet Backbones would be counterproductive.**

An affiliated ISP is a service provider that is owned or controlled by, or is under common ownership or control with, an ILEC.

The Internet backbones are a set of paths that local or regional networks or ISPs connect to pass Internet traffic to locations for which they do not have a direct connection.

The FCC's 1986 Computer III decision provided for a number of competitive incentives as a condition of ILEC integrated entry into the enhanced or information services business. Computer III established nondiscrimination obligations, open network architecture, reporting requirements, and access provisions designed to preserve a vibrant and competitive information service industry. Further review of the Computer III is currently pending before the FCC, after it was remanded from the U.S. Court of Appeals for the Ninth Circuit.

[formerly known as ESP (Enhanced Service Provider)] An Information Service Provider is a company that offers its users the capability to generate, acquire, store, transform, process, retrieve, utilize or make available information via telecommunications.

An Internet host is a term used to describe any computer that has full two-way access to other computers on the Internet. Generally, this term refers to a device or program that provides services to some smaller or less capable device or program.

(Internet Service Provider) An ISP is a company that provides individuals, small businesses, and other organizations with access to the Internet and other related services such as email accounts, Web site building and hosting.

(Open Network Architecture) As part of Computer III, the FCC requires the Bell Companies and GTE to provide open access to the unbundled elements that make up telecommunications services for use by competing information service providers, including ISPs. ONA was intended for competing providers to use the ILEC network in innovative ways and to require competing providers to pay for only those parts of the ILEC network that they need to use.

Shane Greenstein, *The Tale of Two Frontiers*, (October 1996) found at <<http://skew2.kellogg.nwu.edu/~greenst/research.html>>

## MAXIMUM COMMUNICATIONS: It's What Follows a Tough Act

### US INTERNET SERVICE PROVIDERS ALLIANCE

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## MAXIMUM COMMUNICATIONS: It's What Follows a Tough Act

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December 10, 1998

**STAMP IN**

**EX PARTE**

**VIA HAND DELIVERY**

The Honorable William E. Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, DC 20554

**RECEIVED**

**DEC 10 1998**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: CC Docket No. 98-147

Dear Mr. Kennard:

This ex parte letter is submitted by the undersigned competitive telecommunications and information service companies and associations in response to the joint filing submitted in the above-referenced proceeding on December 7, 1998 by the largest incumbent local exchange carriers (four of the five Regional Bell Operating Companies ("RBOCs") and GTE), and certain computer companies. We urge the Commission to reject this proposal as the latest attempt to undermine the statutory mandates and pro-competitive promise of The Telecommunications Act of 1996 ("1996 Act"), and extend the RBOCs and GTE's local bottleneck to Internet services.

In essence, the proponents' ex parte letter argues that the largest ILECs require a wholesale waiver of key elements of the 1996 Act in order to have the necessary economic incentives to deploy high-speed broadband Internet access technologies such as Digital Subscriber Line ("DSL"). The largest ILECs offer four "concessions," each subject to various technical, economic, and timing limitations: (1) CLECs can utilize collocation for advanced services (common cage, virtual, physical, or cageless, of the ILEC's choosing); (2) CLECs can utilize DSL-capable loops as unbundled network element ("UNEs"); (3) the ILECs' integrated provision of DSL services are subject to existing nonstructural safeguards; and (4) the ILECs' advanced services offerings will not discriminate against unaffiliated ISPs.

In exchange for these "concessions," the RBOCs and GTE would receive significant relief from applicable legal requirements, including: (1) no provision of DSL electronics as UNEs; (2) no resale of DSL services at any discount; (3) unlimited transfer of ILEC assets, employees, and services accounts to separate affiliates for up to 12 months; (4) no significant separation requirements; (5) deregulation and detariffing of advanced services rates once half of residential lines have access to DSL services; and (6) granting the RBOCs liberal waivers of interLATA boundaries for data services.

On its face, this proposal is a sham. On legal grounds, this proposal blatantly violates the Act. By "promising" to abide by existing nonstructural safeguards and Computer III nondiscrimination requirements, and to grant competitors access to unbundled loops and collocation rights already required by the 1996 Act, the RBOCs and GTE give up nothing. Instead, however, the largest ILECs gain a "get out of jail free" card from the most critical pro-competitive mandates of the Act. This hardly seems like a fair bargain, especially for consumers, who will be denied choice, innovation, reasonable prices, and the other tangible benefits of competition.

Furthermore, the large ILECs' "lack of incentives" argument is baseless. The Commission itself has assembled an ample public record proving the futility of these claims. First, the supposed difficulties of providing advanced services such as DSL do not involve building brand-new data networks; instead, existing copper loops and telephone plant are being utilized along with DSLAMs and end user modems. This new equipment is relatively inexpensive and certainly can be deployed by the RBOCs and GTE on a timely basis to most ILEC central offices under existing rules. The competitive deployment of DSL service is not hindered by equipment costs or network upgrades, but rather the fundamental inability of CLECs to obtain reasonable cost-based access to the ILECs' equipment and facilities. The large ILECs also ignore the fact that CLECs must fully compensate the ILECs for the right to utilize DSL-equipped loops, DSL electronics, collocation space, and interoffice facilities. Moreover, contrary to their rhetoric, the RBOCs and GTE already are deploying DSL in response to the perceived competitive threat from cable modems.

More importantly, the proposal clearly violates the 1996 Act. As the FCC has already correctly concluded this past August:

Section 251(c)(3) requires these ILECs to provide CLECs with unbundled network elements, including DSL-capable loops and accompanying operational support systems ("OSS"), as well as all facilities and equipment used to provide advanced services (such as DSLAMs);

Section 251(c)(4) requires these ILECs to offer advanced services such as DSL for resale at wholesale rates;

Section 251(c)(6) requires these ILECs to provide competitors with just, reasonable, and nondiscriminatory access to collocation space in order to provide advanced services.

Section 271 prohibits the RBOCs from providing telecommunications or information services across LATA boundaries without meeting the requirements of Sections 271 and 272 of the Act.

Private parties cannot overturn these provisions of the law.



It is the free market, and not government, that creates incentives for companies to invest in and deploy new technologies and services. It is the market, and not government, that rewards risk. But where there is not a free market, and instead only a monopoly market like the large ILECs have today, government must do what it can to curb that monopoly and maximize the conditions for competition.

In many respects, this proposal is the complete opposite of what the Internet itself represents: openness, innovation, competition, and freedom of choice. Perhaps this explains why, even though these RBOCs and GTE and their allies claim to speak on behalf of Internet providers and Internet users, neither of these constituencies is present at the signature line. It is disappointing that these computer companies have joined the RBOCs and GTE in their proposal. How ironic it is that their proposal to "solve" this "problem" does not even include those it purports to serve - there are no consumer groups, no user groups, no competitive local exchange carriers, and no Internet service providers.

In the view of the undersigned, the key problem facing American consumers is not, as these companies claim, the pro-competitive mandates of the 1996 Act, but rather their continuing refusal to abide by those mandates. The only problem here is the large ILECs' local loop bottleneck, and no amount of deal-making, no matter how big the players, can change that reality. The only way to rid American consumers of that bottleneck and offer all the benefits and services backed up and waiting behind that last mile, is, plain and simple, to enforce the 1996 Act.

In accordance with the Commission's ex parte rules, two copies of this letter will be submitted today to the Commission's Secretary's office.

Sincerely,

**UNITED STATES INTERNET SERVICE PROVIDERS ALLIANCE**

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**Commissioner Harold W. Furchtgott-Roth**  
**Commissioner Michael K. Powell**  
**Commissioner Gloria Tristani**  
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**Larry Strickling, Chief, Common Carrier Bureau**  
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Commercial Internet eXchange Assn.  
November 23, 1998

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
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Policy and Rules Concerning the	)	
Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	
	)	
1998 Biennial Regulatory Review --	)	
Review of Customer Premises Equipment	)	CC Docket No. 98-183
And Enhanced Services Unbundling Rules	)	
In the Interexchange, Exchange Access	)	
And Local Exchange Markets	)	

**COMMENTS OF THE**  
**COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

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Date: November 23, 1998

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**COMMENTS OF THE  
COMMERCIAL INTERNET EXCHANGE ASSOCIATION**

**Introduction and Summary**

The Commercial Internet eXchange Association ("CIX"), by its attorneys, files these comments in response to the Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned dockets. CIX is a trade association that represents almost 150 Internet Service Provider member networks who handle over 75% of the United States' Internet traffic.<sup>1</sup> CIX works to facilitate global connectivity among commercial Internet service providers ("ISPs") in the United States and throughout the world.

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<sup>1</sup> The views expressed herein are those of CIX as a trade association, and are not necessarily the views of each individual member.

CIX urges the Commission to continue to protect vibrant competition on the Internet by preventing incumbent local exchange carriers ("ILECs"), and their affiliates, from bundling local access services with CPE and/or information services. ILECs hold monopoly control over an essential input necessary for all ISPs to gain access to their customers, the local access facilities, and they have persistently refused to allow competition of CLECs to flourish. Rules that prevent bundling by the monopoly ILEC serve the public interest in several ways, by: (a) deterring anti-competitive behavior, (b) maximizing consumer choice, and (c) supporting the proliferation of Internet-based services in the U.S. and competition among Internet providers.

Further, there is significant evidence that current ILEC marketing violates the Commission's current no-bundling rule and policy; such bundling is especially pervasive for ILEC packaged high-speed Internet, DSL service, and modems. The Commission should more strongly enforce its current rule; it should also explain that significant ILEC retail discounts on CPE, Internet access, or telecommunications service for the purchase of a bundled package of ILEC services is prohibited.

#### **Discussion**

##### **I. CPE and Information Service Unbundling Rules Should Apply to Incumbent Local Exchange Carriers and Their Affiliates.**

The ILECs today continue to control nearly all local exchange and exchange access to the end-user customer. Despite the best efforts of the Commission and industry to introduce local wireline competition, the ILECs continue to maintain a conclusive and indisputable ownership over the wireline facilities that reach from the public switched network and from the Internet to the end-user's home or business. As the Commission recently noted, "the BOCs remain the dominant providers of local exchange and exchange access services in their in-region states, and

thus continue to have the ability and incentive to engage in anti-competitive behavior against competing ISPs.”<sup>2</sup> These facilities of access to the customer are essential to other providers: ISPs and other users of the PSTN must gain access to the ILEC network to serve their customers. The ILECs’ existing monopoly access to the nation’s end-users provide them with both motive and incentive to leverage and expand that monopoly into adjacent markets, including the Internet access market, which rely on access to the ILEC network as an essential input of service in those adjacent markets.

In CIX’s view, mandatory unbundling of the ILECs’ telecommunications offerings from both the ILECs’ CPE and from its information service offerings is one functional piece of the Commission’s overarching Computer Inquiry rules that prevent ILECs from exercising monopoly power in the adjacent CPE and information service markets.

**A. Mandatory Unbundling Serves the Public Interest Because It Prevents ILECs, and their Affiliates, From Undermining Competitive Markets.**

In CIX’s view, the Commission’s primary objective in this proceeding should be to ensure that its regulatory decisions promote competition and innovation for Internet services. 47 U.S.C. § 230(b)(2) (“It is the policy of the United States to . . . preserve the vibrant and competitive free market that presently exists for the Internet . . .”); *id* at § 161(a)(2) (regulation may be eliminated only after Commission finds “meaningful competition” and “public interest” would be promoted). However, as discussed above, ILECs are currently able and motivated to leverage their monopolies for access to the customer into control over the Internet services

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<sup>2</sup> Computer III Further Remand Proceedings, Further Notice of Proposed Rulemaking, CC Dkt. Nos. 95-20, 98-10, FCC 98-8, at ¶ 51 (rel. Jan. 30, 1998).



market. In CIX's view, bundling of competitive services/products with noncompetitive ILEC access services is a significant means of monopolistic control which must be better addressed, and not tolerated, in this proceeding.

The Commission's concern for bundling and tying arrangements of distinct products starts from the same pro-competition principles that underpin the federal antitrust laws.<sup>3</sup> These laws are designed to prevent a monopolist from extending its market power over one product into the markets of other, related products.<sup>4</sup> Thus, antitrust law is centrally concerned with stopping the monopolist from obtaining dominance in related markets through tying arrangements and monopoly leveraging of markets in which it possesses market power.<sup>5</sup> Vertically integrated offerings that combine monopolized products with distinct products offered in a fully competitive market are fundamentally detrimental to consumers and are against the public interest.<sup>6</sup>

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<sup>3</sup> See Eastman Kodak v. Image Technical Services, 504 U.S. 451, 461-62 (1992); Jefferson Parish Hospital District No.2 v. Hyde, 466 U.S. 2 (1984).

<sup>4</sup> FNPRM, n.4.

<sup>5</sup> Jefferson Parish Hospital, 466 U.S. at 13-14 ("we have condemned tying arrangements when the seller has some special ability – usually called 'market power' – to force a purchaser to do something that he would not do in a competitive market."); Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 518 (1969) ("the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second market.").

<sup>6</sup> Northern Pacific Railway v. United States, 356 U.S. 1, 6 (1958) ("[Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or lower price but because of his power or leverage in another market.").

In CIX's view, if ILECs are able to combine Internet service or CPE with monopolized telecommunications, the Commission's precedent<sup>7</sup> and anti-trust law<sup>8</sup> teaches that diversity and competition in the ISP market are at risk. Bundling by the ILEC, which holds a unique position in the local market, would interfere with the consumer's ability to make rational economic choices as to its local exchange or exchange access services and then a separate choice as to its ISP services. In addition, bundling of products raises concern of significant cross subsidization of competitive ISP services by noncompetitive local access service revenues in violation of the 1996 Act. Cf. 47 U.S.C. § 254(k) ("A telecommunication carrier may not use services that are not competitive to subsidize services that are subject to competition.") At a minimum, allowing ILECs to bundle such products would raise nearly impossible problems of enforcement of the Commission's policies against "unreasonable" practices and cross-subsidization.

A no-bundling rule for ILECs is also in the public interest because it promotes consumer choice. By separating the ILEC access service from the information service or CPE, consumers can choose to combine ILEC local access services with the information or CPE products of unaffiliated, competing providers. Competitive markets for CPE must be separate from ILEC telecommunications: "[b]eginning with our *Carterfone* decision this Commission has embarked

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<sup>7</sup> As the Commission recognized in the *Qwest Order*, the combination of a monopoly product with a fully competitive one is clear: "[t]he obvious result is less local competition. The perhaps less obvious, but equally serious, result is less long distance competition." *In the Matter of AT&T Corp. v. Ameritech Corp., et al., Memorandum Opinion and Order*, File Nos. E-98-41, E-98-42, E-98-43, FCC 98-242, at ¶ 7 (rel. Oct. 7, 1998).

<sup>8</sup> See, nn. 3 to 6, above.

on a conscious policy of promoting competition in the terminal equipment market.”<sup>9</sup> Several benefits to consumers result: “improved maintenance and reliability, improved installation features including ease of making changes, competitive sources of supply, the option of leasing or owning equipment, and competitive pricing and payment options.”<sup>10</sup> The Commission has pursued a parallel policy of separating the monopoly-based telecommunications products from the distinct information service markets to promote consumer welfare: the regulatory goals are “minimiz[ing] the potential for improper cross-subsidization, safeguard[ing] against anticompetitive behavior, . . . and fostering a regulatory environment conducive to . . . the introduction of new and innovative communications-related offerings’ and ‘enabl[ing] the user to take advantage of the ever increasing market applications of computer . . . technology.”<sup>11</sup> As applied to ILECs, the no-bundling policy is an integral component of the continuing policy objectives for consumer choice.

Moreover, the bundling of Internet services with the ILEC’s monopoly access telecommunications service would have an especially pernicious impact on the Internet market. Today’s Internet is based on open protocols and specialized industry offerings that collectively compose the Internet. Internet offerings are assembled from many distinct providers, including companies in (1) consumer premises equipment (“CPE”); (2) local transport; (3) Internet access; (4) application software; (5) content; and (6) backbone services. The Internet has flourished as a

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<sup>9</sup> Computer II, 77 F.C.C. 2d. 384, 439 (1980), *citing*, Carterfone, 13 F.C.C. 2d. 420 (1968).

<sup>10</sup> Id.

<sup>11</sup> *Federal-State Board on Universal Service, Report to Congress*, CC Dkt. No. 96-45, FCC 98-67, at ¶ 23 (rel. April 10, 1998), *quoting*, Computer II, 77 F.C.C.2d at 389-90.

result of the decentralized and competitive offering of these elements, rather than from bundled offerings. From this independence follows competition and innovation, as an industry for each protocol layer focuses on and develops responsive products. By contrast, ILEC bundled offerings that combine the ILEC monopoly transport component with the Internet access and/or CPE presents a striking attempt to vertically integrate the Internet market. CIX believes this tendency toward ILEC vertical integration is contrary to the public interest. 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . .").

Finally, a strong rule prohibiting ILEC bundling is an essential component to the Commission's general regulatory approach of ILEC participation in a fully competitive ISP market. For example, the RBOCs are obligated to unbundle telecommunications services, offer all telecommunications services in a nondiscriminatory fashion, and to take telecommunications for its own ISP offerings on the same terms and conditions.<sup>12</sup> However, if an RBOC can offer *only* a bundled product which combines CPE and information services with a telecommunications service (e.g., ADSL), then the obligation for the ILEC to separately offer nondiscriminatory access to the telecommunications for other ISPs would lose significant meaning. The ILEC, at most, offers a tariffed telecommunications offering to competing ISPs which would never actually apply to its own offering. This completely undermines the Commission's intent for all ISPs, including the BOC-affiliated ISP, to have equivalent access to

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<sup>12</sup> Computer III Final Decision, 104 F.C.C. 2d 958, 1040 (1986) (CEI parameters require BOC to unbundle and tariff all basic services and for affiliated-BOC ISP to take basic service only pursuant to CEI tariff).

underlying telecommunications. For example, if Internet access, CPE, and ADSL service are all offered as a bundled package, it is virtually impossible to discern whether the ILEC is favoring its affiliated ISP. Nor would the ILEC be motivated in any way to supply orders made under the non-affiliate tariff for underlying telecommunications services, such as ADSL, since each order filled is an opportunity missed for the ILEC to sell a bundled package of services.

However, as discussed below, even the ILECs' current bundling practices raise significant concerns of cross-subsidization and vertical integration of services despite the Commission's existing no-bundling rules.

**B. ILEC Bundling of CPE/ISP/Telecommunications Services Is Ongoing Today, and Harming Consumer Choice and Competition in the ISP Market.**

While the Commission proposes to eliminate the no-bundling rule for some carriers, it should be noted that the ILECs' current practices raise significant questions as to current compliance. For example, the ILECs already bundle their ADSL service with their Internet service and CPE (e.g., modem) to promote a bundled package, and not separate pricing, in the following ways:

Ameritech gives away modems required for ADSL service, valued at \$199.00, to customers that purchase their "Ameritech.net High Speed" service.<sup>13</sup> Ameritech also offers a bundled offering of the underlying ADSL telecommunications and Internet services;

Bell Atlantic offers ADSL modems for \$49.95, and free installation for customers that purchase Bell Atlantic Internet access service and ADSL service.<sup>14</sup> A recent mailer of Bell Atlantic also states, "Just make a 12-month commitment. In

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<sup>13</sup> [www.ameritech.net/visitors/adsl/adsl\\_faq.html](http://www.ameritech.net/visitors/adsl/adsl_faq.html) (attached).

<sup>14</sup> [www.bell-atl.com/adsl/more\\_info/pricing.html](http://www.bell-atl.com/adsl/more_info/pricing.html) (attached).

addition to the special modem price(which includes \$50 back) you'll get home installation and an ethernet card for free. That's a savings of up to \$434,"<sup>15</sup>

BellSouth offers a \$10 discount with its bundled package of DSL and Internet access for customers that are also local voice telephone subscribers;<sup>16</sup>

US West waives the customer's hardware cost of \$300 for customers that purchase the US West ADSL offering. Just last week, Dell and Compaq announced plans to ship personal computers with high-speed digital modems in conjunction with US West's ADSL/Internet bundled offering;<sup>17</sup>

Pacific Bell offers free installation to customers that sign up for one-year subscriptions of their bundled ADSL and Internet offering. Otherwise, installation costs \$150.00 for the ADSL and \$125 for the Internet Access.<sup>18</sup>

CIX believes these are just a sample of the ways in which ILECs use marketing practices such as bundling to erode competitive conditions in adjacent markets such as CPE and Internet access.

Further, CIX notes that the practice of DSL installation as part of a bundled package is price discrimination against independent ISPs. Obviously, DSL installation charges are a part of the cost of an ILEC's DSL service, and is typically deemed a "nonrecurring charge" of the service.<sup>19</sup> However, providing reduced rates for DSL only to customers that choose the ILEC-affiliated ISP, by offering free installation, results in higher prices charged to all customers of

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<sup>15</sup> See attached Bell Atlantic mailer.

<sup>16</sup> [www.bellsouth.net/external/adsl/cost.html](http://www.bellsouth.net/external/adsl/cost.html) (attached).

<sup>17</sup> [www.news.com/News/Item/0,4,28965,00.html?st.ne.ni.lh](http://www.news.com/News/Item/0,4,28965,00.html?st.ne.ni.lh) (attached).

<sup>18</sup> [www/public.pacbell.net/dedicated/dsl\\_solutions.html](http://www/public.pacbell.net/dedicated/dsl_solutions.html) (attached).

<sup>19</sup> See Bell Atlantic Tel. Co., Tariff F.C.C. No. 1, Access Service, Transmittal No. 1076, § 16.8(G) ("rates and charges" of Bell Atlantic Infospeed DSL Service list installation charge of \$99.00 as a "nonrecurring charge"), *tariff investigation pending*, CC Dkt. No. 98- 168.

independent ISPs. This price discrimination violates the Computer III CEI parameters,<sup>20</sup> and is indicative of the abuses and unreasonable practices that occur with ILEC bundling.

## **II. FCC Must Do More To Enforce Its Information Service and CPE Rules**

CIX urges the Commission to do more to protect the vibrant ISP market from ILEC abusive bundling and marketing practices. In CIX's view, the Commission should first articulate in clear terms that the no-bundling rule, and its policy, is to encourage competition and consumer choice in each market with ILEC participation.<sup>21</sup> The rule should be further explained and effectuated by requiring ILECs to (a) separately tariff all telecommunications services used by its affiliated ISP, (b) assess a separate line-item charge on the subscriber bill for each component of the bundled service, and (c) charge no less than the full cost of CPE or information service offered. In this way, the telecommunications service is truly decoupled from the information service, and all ISPs can compete with the ILEC-affiliated ISP without the threat of illegal cross-subsidized bundled packages.

In addition, enforcement of the Commission's rules promoting the development of a competitive market for advanced Internet services -- including the no bundling rule -- is critical.

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<sup>20</sup> Computer III, 104 F.C.C. 2d at 1040 (BOC must unbundle and tariff basic service, and affiliated ISP must take service on a resale basis so that all ISPs obtain basic telecommunications services at the same price).

<sup>21</sup> The Commission has offered guidance on what constitutes "bundling." *Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, First Report and Order*, 11 FCC Rcd. 21905, n. 276 (1996) ("special discounts or incentives to take both services . . . would constitute sufficient evidence of bundling") ("Non-Accounting Safeguards Order"); *id.*, at ¶ 277 ("We define 'bundling' to mean offering BOC resold local exchange services and interLATA services as a package under an integrated pricing

(footnote continued to next page)

In CIX's view, the ILECs simply do not comply fully with the existing rules on unbundling telecommunications, information service, and CPE, as is demonstrated by the attached materials. Therefore, CIX urges the Commission to apply its Second R&O<sup>22</sup> accelerated process to ISP complaints that raise issues of compliance with the Commission's unbundling rules. As the Commission noted, the accelerated complaint process is intended to effectuate the provisions of the 1996 Act and "to stimulate real competition among market participants."<sup>23</sup> Further, the burden of production should shift to the ILEC in such a proceeding, once the complainant has met the pleading requirements of an initial complaint; the ILEC should be required to explain all of its marketing efforts and how they meet the Commission's unbundling rules. Burden shifting will encourage more day-to-day compliance by the ILEC, and will aid in the resolution and settlement of such complaints once filed.<sup>24</sup> Similarly, the Commission should not employ a presumption of reasonableness of the RBOC's conduct; such a presumption is unnecessary and could interfere with the enforcement of competing providers' rights.<sup>25</sup>

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*(footnote continued from previous page)*

schedule."); FNPRM, at ¶ 1 ("Bundling means selling different goods and/or services together in a single package.").

22 "Amendment of the Commission's Rules Regarding Procedures to be Followed When Formal Complaints are Filed Against Common Carriers," Second Report & Order, CC Dkt. No. 96-238, FCC 98-154 (rel. July 14, 1998) (the "Second R&O").

23 Id., ¶¶ 1, 18.

24 Non-Accounting Safeguards Order, ¶¶ 346-47 (burden shifting improves expeditious resolution of complaints, and ensures that RBOCs take local competition laws seriously).

25 See, e.g., id., ¶ 351 (FCC eliminates presumption of reasonableness of RBOC conduct in Section 271 complaints).



Finally, CIX suggests that the Commission initiate a proceeding to consider the ways in which the ILECs have failed to meet the Commission's existing no-bundling rules. The marketing tactics of several ILECs, discussed above, shows a strong indifference and callousness towards the Commission's rules and its policy objectives for a vibrantly competitive ISP industry.

**Conclusion**

As discussed above, CIX urges the Commission to require ILECs to unbundle underlying telecommunications services for the benefit of all ISPs in the market and to maintain consumer choice of ISP services.

Respectfully submitted,

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